

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

**JANET C. BAKER, SUSAN INMAN, and
OLLY NEAL**

PLAINTIFFS

V.

**JOHN THURSTON, in his official capacity
as the Secretary of State of Arkansas**

DEFENDANT

**BRIEF IN SUPPORT OF PLAINTIFF’S RESPONSE IN OPPOSITION
TO MOTION FOR INTERVENTION**

BACKGROUND

Plaintiffs filed this action on June 23, 2020, seeking a preliminary and permanent injunction, and declaratory judgment relief against Defendant John Thurston in his official capacity as the Secretary of State of Arkansas and Chair of the State Board of Election Commissioners. Plaintiffs seek declaratory judgment on three issues: (1) that current Arkansas law allows fear of COVID-19 as a valid excuse for being “unavoidably absent” for the purposes of voting by absentee ballot; (2) that current Arkansas law allows voters to use any and all reasons or excuses whatsoever for the purpose of being “unavoidably absent” and voting by absentee ballot; and (3) *alternatively*, that if the Arkansas Code does not allow any excuse to suffice for voting absentee, then the law is an unconstitutional infringement of Plaintiffs’ rights to vote under article three, section two the Arkansas Constitution. If the court rules that any and all excuses are valid excuses to vote absentee, as the Arkansas Supreme Court indicated was the law then there would be no constitutional argument. In *Forrest v. Baker*, 287 Ark. 239 (1985), the Arkansas Supreme Court held that voters are not required to explain in detail or provide any

certain information as a “reason” to vote by absentee ballot.

Plaintiffs in this action are registered voters in Arkansas and include: (1) Janet C. Baker, who stated that, because of an autoimmune disorder and fear of contracting COVID-19, she would like to vote absentee and would not vote in person if she could not vote by absentee ballot; (2) Susan Inman, who stated that she is healthy, she does not want to risk getting COVID-19 by voting in person in 2020, and that she wants to vote absentee in 2020 and subsequent elections because she wants to stay at home and have more time to consider the candidates and issues on the ballot; and (3) Olly Neal, who stated that he has autoimmune disorders, that he would prefer to vote absentee to avoid contracting COVID-19, but that if he could not vote via absentee ballot, he would still vote in person.

After Plaintiffs filed this action, Defendant Thurston issued a statement on June 25, 2020, apparently – but not clearly – stating that registered voters may vote absentee because of COVID-19. Thurston stated: “It is my opinion and belief, that our current laws are sufficient to allow the registered voters of Arkansas the choice of going to their local polling location or requesting an absentee ballot from their local County Clerk.”¹ Thurston also stated that “[his] office continues to work with county officials to prepare polling locations” and is “anticipating and preparing for an increase in Absentee Ballot requests due to the COVID-19 virus.”²

Doyle Webb and Representative Doug House filed their Motion for Intervention on June 29, 2020. On July 2, 2020, Governor Asa Hutchinson, a Republican, and Defendant Thurston, also a Republican, both indicated that they believed current laws allow the ability to vote with an

¹ <https://www.fox16.com/news/local-news/statement-from-arkansas-secretary-of-state-john-thurston-in-absentee-ballots-in-november-because-of-covid-19/>

² *Id.*

absentee ballot due to the pandemic.³ Neither Defendant Thurston nor Governor Hutchinson have taken any official action beyond their statements to affirm that registered voters in Arkansas may use fear of COVID-19, or any other excuse, as a valid excuse for being unavoidably absent and voting by absentee ballot. Defendant Thurston and Governor Hutchinson’s statements did not address the other claims in Plaintiffs’ complaint. Notably, Doyle Webb appeared at the same press conference as Defendant Thurston and Governor Hutchinson on July 2, 2020, and was reported as saying “he supports the governor’s announcement and encouraged voters to request absentee ballots if they fear going to the polls.”⁴ Also, on July 2, 2020, Defendant Thurston, through his counsel, the Office of the Attorney General, filed his motion to dismiss.

ARGUMENT

The Court should deny the Motion for Intervention because Mr. Webb and Representative House (“Applicants”) fail to meet the requirements of intervention in Rule 24 of the Arkansas Rules of Civil Procedure. Rule 24 permits a party to intervene either as (a) intervention of right or (b) permissive intervention. For the reasons stated below, Applicants fail to meet the requirements of both intervention of right and permissive intervention.

I. Intervention of Right Does Not Apply to Applicants

Rule 24(a) prescribes for intervention of right in two instances: (1) when a statute confers the right to intervene (not at issue here and not claimed by Applicants); and (2) “when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” Ark. Rule Civ. Pro. 24. Under Rule 24(a)(2), the Court denies an

³ <https://www.thv11.com/article/news/health/coronavirus/absentee-ballot-voting-arkansas-coronavirus/91-6c512d44-80f8-45d2-9bfa-d516e84977b6>

⁴ <https://www.arkansasonline.com/news/2020/jul/03/virus-ok-as-excuse-for-voting-absentee/?news-arkansas>

application to intervene if the applicant has no “protectable interest in the outcome.” *Ark. Dem. Gaz. v. Brantley*, 194 S.W.3d 748, 750, 359 Ark. 75 (2004). The Supreme Court in *Brantley* affirmed that an applicant must prove three requirements to intervene under Rule 24(a)(2). *Id.*

[I]n order to intervene under Rule 24(a)(2), the party must prove (1) that he has a recognized interest in the subject matter of the primary litigation, (2) that his interests might be impaired by the disposition of the suit, and (3) that his interest is not adequately represented by existing parties.”

Id. (citing *Medical Park Hospital v. Bancorp South Bank*, 357 Ark. 316, 166 S.W.3d 19 (2004); *Billabong Products, Inc. v. Orange City Bank*, 278 Ark. 206, 644 S.W.2d 594 (1983).

Applicants for intervention in this action – Mr. Webb and Rep. House – have failed to prove all three of these requirements to intervene by right under Rule 24(a)(2).

A. Applicants have failed to prove that they have a recognized interest in the subject matter of this litigation.

Applicants do not have any recognized interest in the subject matter of the litigation. When evaluating whether an applicant has a “recognized interest in the subject matter of the litigation,” Courts have considered whether the non-parties have existing rights in the subject matter of the lawsuit and have denied applications of intervention when alleged interests are merely “derivative” or conditional on another person’s rights. *See Med. Park Hosp.*, 166 S.W.3d 19, at 28. Courts evaluate whether the alleged interest relates to the transaction which is the subject of the action. *Billabong Products*, 644 S.W.2d 594, at 595.

In *Billabong*, the applicant to intervene was a company that alleged it received a loan from a Bank; the parties in the original action were the guarantors of the applicant / debtor, and the subject matter of the original action was the guaranty agreement, not the alleged loan agreement. 644 S.W.2d at 595. The Court denied the motion for intervention, stating that the

applicant's alleged interest—a loan agreement—was a separate transaction than the subject matter of the lawsuit—the guaranty contract. *Id.* Therefore, the court held that the applicant's claimed interest was not a recognizable interest in the subject matter of the original action. *Id.*

Here, this action is one for declaratory judgment. Plaintiffs' fundamental rights to vote, status, and other legal relations are affected by a question of construction of Arkansas law, and Plaintiffs seek a declaration of their rights thereunder. In their motion for intervention, Mr. Webb and Representative House dream up opaque interests and baseless allegations that have nothing whatsoever to do with the subject matter of this litigation: Plaintiffs' request for declaratory judgment of their rights under existing law.

In their application for intervention, Webb and Rep. House mention unspecified “experience[s]” of “problems that arise when election materials are entrusted to the U.S. Postal Service for delivery.” The handling of election materials by the U.S. Postal Service is not a recognized interest or issue whatsoever in the subject matter of this action and has nothing to do with the construction of the Arkansas Code or the Arkansas constitution. Rep. House also states he is “concerned about the dilution of his vote by the participation of persons who are not registered voters.” This fantasy completely misses the mark; only registered voters can vote absentee, and Plaintiffs' action for declaratory judgment neither challenges nor impacts that matter of law and of fact whatsoever. The entire tenor of Webb and Rep. House's motion rests on faulty policy debates and fearmongering about voting that have nothing to do with the subject matter of this litigation, which is simple: does current Arkansas law (specified statutes and the constitution) allow Plaintiffs, and other similarly situated eligible (registered) voters, to vote by absentee ballot?

If, as in *Billabong*, a debtor's interest in a loan agreement is not a recognizable interest in

a lawsuit dealing with the debtor's guarantor and the guarantor's separate agreement with the bank, then it is inconceivable that Applicants here and their more generalized, dreamt up fears of the U.S. Postal office and nonregistered voters, could relate to or have an interest in the subject matter of this case. Applicants' fears about the voting system in no way relate to or have an interest in Plaintiffs' request for a declaratory judgment about their ability to vote absentee. Accordingly, Applicants have failed to prove they have a recognizable interest in this action, and the Court should deny their motion for intervention.

B. Applicants have failed to prove that their interests may be impaired by the disposition of the suit.

Further, the disposition of this action does not impair or impede Webb or House's "interests." When evaluating the second *Billabong* factor, Courts evaluate whether the applicant for intervention "will be left with his right to pursue his own independent remedy against the parties, regardless of the outcome of the pending case." *Billabong*, 644 S.W.2d at 595. If the applicant will be left with her right to pursue an independent remedy, then she "has no interest that needs protecting by intervention of right." *Id.* The Court in *Billabong* went as far to say that even the potential that stare decisis would prevent a party from prosecuting its claim is an "insufficient reason[] to allow intervention as a matter of right." *Id.*

In *Billabong*, the Court denied the application for intervention because "[n]o matter how the suit between the Millars and the Bank is decided, Billabong can still bring an action against the Bank for breach of contract to loan money or for promissory deceit Since Billabong is not a party to the action, any judgment against the Millars would not be binding upon it under the principle of res judicata. *Id.*

Here, the outcome of this action has no bearing whatsoever on the ability of Mr. Webb, Rep. House, or the Republican Party to pursue their own independent actions or remedies over their claimed interests—real or fantasized—regarding the U.S. Postal Service’s handling of election materials, the fear of nonregistered Arkansans voting in the election, or any other claimed interest of the Applicants. The Applicants have provided no proof or even claim whatsoever showing that the disposition of Plaintiffs’ action—whether Plaintiffs can vote absentee—impacts at all the ability of Applicants to pursue a remedy for their “interests.” The Applicants’ interests have nothing to do whatsoever with Plaintiffs’ action, claims, or circumstances at issue in this case. Accordingly, the Court should deny Applicant’s Motion for Intervention.

C. Applicants have failed to prove that their interests are not adequately represented by Defendant Thurston and Defendant’s counsel, the Attorney General.

Even if Webb and Rep. House’s fictional “interests” were somehow at issue in this action or would be impaired by the disposition of this action – which they are not – Webb and Rep. House have provided no facts, proof, reasoning, or other information showing that the Secretary of State of Arkansas or his counsel, the Attorney General of the State of Arkansas, cannot adequately represent those interests as they would relate to this action.

The only reason Applicants provide for stating Defendant does not adequately represent their interests is that “the Secretary of State is not charged with protecting” the “interest” that “qualified electors” may have against “[v]oting permitted by unqualified persons.” Yet Applicants do not allege that Plaintiffs are unqualified. To the contrary, Plaintiffs are qualified, registered voters seeking a declaration of their rights under existing law. The Secretary of State is the Chief Election officer of the State of Arkansas

and his counsel, the office of the Attorney General, is charged with defending the state in court. Both Defendant and his counsel are duly elected statewide officeholders, happen to also be Republicans, and adequately represent any interests maintained by Applicants that might relate to the subject of Plaintiffs' action. Moreover, Applicants even admit that the Secretary of State's "function is to insure [sic] that those laws are followed not only by his office but also by local election officials." That is exactly what this declaratory judgment action is all about: the construction and enforcement of existing state laws. As Applicants acknowledge, the Secretary of State is the only proper Defendant of those issues. Therefore, the Court should deny Applicants' motion for intervention.

II. Permissive Intervention Does Not Apply to Applicants

Mr. Webb and Representative House also fail to meet the requirements for permissive intervention because they have no statutory conditional right of intervention and they have no interest, claim, or defense, that is related to this action or that shares a common question of law or fact. *See Ark. Dem. Gaz. v. Brantley*, 359 Ark. 75 (2004).

"Permissive intervention is a matter resting within the sound discretion of the trial court." *Billabong*, 644 S.W.2d at 595. Courts typically deny applications for permissive intervention upon finding no common questions of law or fact between the interests of the applicants for intervention and the original action. *Id.* "Absent a statutory conditional right of intervention, Rule 24(b)(2) only applies where there is a common question of law or fact in the main action." *Brantley*, 194 S.W.3d at 751.

In *Brantley*, the Arkansas Supreme Court evaluated whether the Arkansas Democrat-Gazette's interest in photos had any relationship with an underlying personal injury lawsuit. *Id.* Finding that the "dispute over the photos and the personal injury lawsuit have no relationship,"

the Court determined that “there is not a common question of law or fact between the Arkansas Democrat-Gazette’s claims and the main action.” *Id.*

Here, Applicants’ claimed interests have no relationship to the main action. Again, Applicants claim interests in preventing voting of “unqualified persons,” “the major impact of unsound voting policies,” and the handling of election mail by the U.S. Postal Service. None of these “interests,” claims, or issues has any relationship to this main action. If Applicants were to independently pursue remedies for these interests, they would concern matters of fact and law wholly distinct and separate from anything under consideration by this Court in the main action. Again, Plaintiffs’ action is a simple request for declaratory judgment on whether existing Arkansas law allows registered voters like them to vote by absentee ballot. No issue of fact or law in Plaintiffs’ action concerns the lack of voter registration (Plaintiffs are all registered voters) or any issues with the U.S. Postal Service or any other “interest” cited by Webb and Rep. House. Accordingly, the Court should deny Applicants’ motion for permissive intervention.

CONCLUSION

Accordingly, Mr. Webb and Rep. House fail to meet the requirements of intervention of right or of permission in Rule 24 of the Arkansas Rules of Civil Procedure, and therefore, the Court should deny with prejudice the Motion for Intervention by Doyle Webb Chairman of the Republican Party of Arkansas and Representative Douglas House.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on all counsel of record.

s/s David A. Couch